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NOTES

USING CONSTITUTIONAL ZONING TO NEUTRALIZE ADULT ENTERTAINMENT— DETROIT TO NEW YORK

I. Introduction

In an effort to prevent the spread of businesses specializing in adult entertainment, the city of Boston in 1974 established the first officially zoned adult entertainment district in the nation.¹ The designated purpose of the district was to contain all businesses specializing in adult entertainment to a two and one-half block downtown area, commonly referred to as the Combat Zone.²

In New York City, there is no officially designated adult entertainment district, but the Times Square area, with its proliferation of businesses specializing in adult entertainment,³ would appear to be this city's "Combat Zone."⁴ To prevent the concentration of businesses specializing in adult entertainment and their accompanying problems, New York City has recently proposed new zoning regulations.⁵ Rather than using the Combat Zone concept of re-

1. Newsweek, Dec. 2, 1974, at 43.

2. *Id.* At its inception, there was little opposition to the adult entertainment district; however, today it is the subject of many heated controversies. A strong pervading sense of "anything goes" has developed from a "tacit understanding that the police were to direct their law efforts outside the zone." N. Y. Times, Dec. 4, 1976, at 10, col. 1. The present controversy in Boston is the result of two factors. Early in November, 1976, the then Police Commissioner issued an internal police report citing gross incompetence and corrupt inattention by the police assigned to the Combat Zone. Recently two Harvard football players were stabbed during a post season excursion into the area. *Id.*

Boston Police Commissioner Joseph M. Jordan stated that the effort to contain sexual activity was a "failure." Although businesses specializing in adult entertainment may be limited to this area, the district's prostitutes have been forced to areas outside the Combat Zone by groups of "female muggers working the district." *Id.*

Boston will initiate a new crackdown using state liquor laws to prevent the solicitation of alcoholic beverages by performers in adult entertainment establishments. *Id.* at col. 1. See section III *infra*.

3. N.Y. Times, Nov. 12, 1976, at A1, col. 4.

4. Unlike Boston's Combat Zone, businesses specializing in adult entertainment in New York are not limited to the Times Square area. "More recently, these highly profitable businesses have been put in more fashionable areas like Lexington Avenue, between 50th and 60th streets, and in lower Manhattan and downtown Brooklyn." *Id.* at A1, col. 4.

5. *Proposed Amendments to the New York City Zoning Resolution: Hearings on Art. I,*

stricting adult entertainment businesses to a particular district, the regulations propose that businesses specializing in adult entertainment be dispersed throughout the city. The proposed regulations provide for specific distances between individual adult entertainment businesses⁶ as well as specified distances between these businesses and residential districts.⁷

New York City's proposed zoning is almost identical to the Detroit zoning regulations⁸ which require not more than two regulated uses within 1,000 feet of each other.⁹ Through a series of amendments in 1972, Detroit added businesses specializing in adult entertainment to the list of regulated uses.¹⁰ The zoning ordinances note that these businesses have a deleterious effect on residential neigh-

II, & III Before the City Planning Comm'n, COMPREHENSIVE CITY PLANNING CALENDAR [No. 21] 10 (1976) [hereinafter cited as *N.Y.C. PROPOSED AMENDMENTS*].

6. N.Y.C. PROPOSED AMENDMENTS art. III, ch. 2, §32-462 states: "[N]o new *adult use* may be established where, within an area circumscribed by a line of 1,000 feet perpendicular or radial distance from the center of the *zoning lot* of the proposed new *adult use* two [three depending on the particular district] or more *adult uses* presently exist."

7. N.Y.C. PROPOSED AMENDMENTS art. III, ch. 2, § 32-461 states: "[N]o *adult use* shall be located within 500 feet of a *residential district*. The distance shall be determined by measuring from the edge of the nearest *residential district* boundary to the closest *lot line* of the *zoning lot* containing an *adult use*." *Id.* See note 74 *infra*.

8. Compare DETROIT, MICH., OFFICIAL ZONING ORDINANCE 742-G, §§ 32.007, 66.0000, 66.0101, and 9410300 (1972) and 891-G, ch. 68 (1974) with N.Y.C. PROPOSED AMENDMENTS art. I, ch. 2, § 12-10, art. III, ch. 2, §§ 32-461 and 32-462, and art. VIII, ch. 3, § 73-35. There is one major difference between the Detroit plan and the proposed New York amendments. The Detroit regulations did not restrict the location of business that predated the effective date of the zoning regulations. New York City's proposed amendments contain a plan for the amortization of adult uses. See N.Y.C. PROPOSED AMENDMENTS art. III, ch. 2, § 32-464. Any preexisting adult entertainment business that would violate the proposed amendment would be required to terminate within one year of the effective date of the amendments. When there is a violation because there are more than two or three adults uses, the proposed amendments solve the problem of which business is to terminate by providing:

Whenever such concentrations are exceeded the number of *adult uses* shall be reduced to the permissible concentration level by terminating those *adult uses* closest to the nearest *resident* district. Where two or more *adult uses* are located on different *stories* within a single *building* the use located on the lower *story* is deemed to be closer to the nearest *residential district* boundary. Where two adult uses are equidistant from the nearest *residential district* boundary the *adult use* occupying the larger *floor area* shall be the use which terminates.

Id.

9. DETROIT, MICH., OFFICIAL ZONING ORDINANCE 742-G § 66.0000 (1972).

10. Prior to the 1972 additions, the regulated uses included: bars, hotels, motels, pawn shops, pool and billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. *Id.*

borhoods.¹¹ The businesses include adult book stores, adult motion picture theaters, and adult mini motion picture theaters,¹² and group "D" cabarets.¹³

The regulation of businesses featuring adult entertainment raises several constitutional questions involving the first, fourteenth, and

11. *Id.*

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that those adverse effects will not contribute to blighting or downgrading of the surrounding neighborhood The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area

Uses subject to these controls are as follows:

Adult

Adult Book Store

Adult Motion Picture Theatre

Adult Mini Motion Picture Theater

Cabaret

Group "D" Cabarets

Id.

12. DETROIT, MICH., OFFICIAL ZONING ORDINANCE 742-G § 32.007 (1972):

Adult Book Store

An establishment having a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas"

Adult Motion Picture Theater

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing, or relating to "Specified Sexual Activities" or "Specified Anatomical Areas"

Adult Mini Motion Picture Theater

[This is defined in the same manner as Adult Motion Picture Theater but distinguished by a seating capacity "for less than 50 persons."]

Numerous "Specified Sexual Activities" and "Specified Anatomical Areas" are exactly defined in this section. *Id.*

See N.Y.C. PROPOSED AMENDMENTS art. I, ch. 2, § 12-10. New York, as Detroit, includes among the regulated uses adult book stores (§ 12-10 (a)) and adult motion picture theaters (§ 12-10 (b)) but it adds to the list of regulated adult uses adult coin operated facilities (§ 12-10 (c)), and adult physical culture establishment (§ 12-10 (e)).

13. DETROIT, MICH., OFFICIAL ZONING ORDINANCE 742-G § 32.007 (1972).

"Group 'D' Cabaret

A cabaret which features topless dancers, strippers, male or female impersonators, or similar entertainers." *Id.*

See N.Y.C. PROPOSED AMENDMENTS art. I, ch. 2, § 12-10 (d). New York does not limit its zoning of topless dancing to establishments licensed to sell alcoholic beverages. *Id.*

twenty-first amendments. The issues may be best examined in light of two recent cases. In *Young v. American Mini Theatres, Inc.*,¹⁴ two adult movie theaters located within 1,000 feet of two other regulated businesses were in violation of the 1972 Detroit zoning ordinance.¹⁵ The Supreme Court upheld the ordinance on the grounds that the city of Detroit was interested only in attempting to regulate the concentration of adult entertainment businesses in residential areas and not the content of the entertainment featured by these businesses.¹⁶ This interest was a sufficient compelling state interest to permit an infringement of first amendment rights.¹⁷

In *Felix v. Young*,¹⁸ plaintiff's cabaret, which featured topless dancing, was located within 1,000 feet of two other regulated uses in violation of the 1972 Detroit zoning regulation. The Sixth Circuit Court of Appeals upheld the zoning ordinance as valid within the regulatory power of the twenty-first amendment.¹⁹

This Note will consider whether the zoning of businesses specializing in adult entertainment is a legitimate exercise of the state's police power, analyzing its potential as a violation of the first amendment and the equal protection clause of the fourteenth amendment. In addition, the Note will examine the validity of using the twenty-first amendment to regulate adult entertainment businesses that serve alcoholic beverages.

II. Equal Protection—A Claim Against Zoning

The purpose of the state's police power, the power to define and regulate, is to promote and protect the general welfare.²⁰ It is well established that the state may exercise its police power in the interest of public safety, public health, public morals,²¹ peace and quiet,

14. 427 U.S. 50 (1976), *rev'g sub nom.* *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975), *rev'g sub nom.* *Nortown Theatre, Inc. v. Gribbs*, 373 F. Supp. 363 (E.D. Mich. 1974).

15. 427 U.S. at 54-55.

16. *Id.* at 71-73.

17. *Id.*

18. 536 F.2d 1126 (6th Cir. 1976).

19. *Id.*

20. *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877).

21. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1877).

and law and order.²² This power is broad²³ and inclusive.²⁴ Legislation authorized by the state police power possesses a presumption of validity.²⁵

Zoning, the regulation of land use,²⁶ is an exercise of the state's police power.²⁷ In *Village of Euclid v. Ambler Realty Co.*,²⁸ the Supreme Court held that the state may classify land according to its use, be it industrial, commercial, or residential, in the interest of public health and safety.²⁹ It would seem that a city, in the best

22. *Berman v. Parker*, 348 U.S. 26, 31 (1954).

23. See *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915).

24. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

25. *Powell v. Pennsylvania*, 127 U.S. 678, 685-86 (1888); *City of Ann Arbor v. Northwest Park Constr. Corp.*, 280 F.2d 212, 223 (6th Cir. 1960). When an act or ordinance is questionable, the courts have held that the legislative decision should control. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Radice v. New York*, 264 U.S. 292, 294 (1924). Accordingly, decisions made by legislative bodies within the scope of their police power as to the means to accomplish the stated objective should not be reappraised. See *Young v. American Mini Theatres, Inc.*, 96 S. Ct. 2440, 2452 (1976); *Berman v. Parker*, 348 U.S. 26, 33 (1954); *But cf. Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 115-31 (1971). For this reason a court will not question possible underlying legislative motive. See *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904); *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014, 1019 (6th Cir. 1975). The courts will question whether the means used are within specific constitutional limitations. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

26. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *American Sign Corp. v. Fowler*, 276 S.W.2d 651, 654 (1955); 1 C. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 1-23 through 1-27 (3d ed. 1974).

27. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Boardman v. Davis*, 231 Iowa 1227, 3 N.W.2d 608, 610 (1942); *American Sign Corp. v. Fowler*, 276 S.W.2d 651, 654 (Ky. 1955); 440 E. 102nd St. Corp. v. *Murdock*, 285 N.Y. 298, 304, 34 N.E.2d 329, 331 (1941).

28. 272 U.S. 365 (1926).

29. *Id.* at 387. The state is not limited to traditional zoning of residential and commercial districts strictly for the purpose of better police and fire protection. See *Id.* at 380-94; Note, *Zoning: Permissible Purposes*, 50 COLUM. L. REV. 202 (1950). The Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954), held that Congress could regulate land use to insure that a community is "beautiful as well as healthy, spacious as well as clean, [and] well-balanced as well as carefully patrolled . . ." *Id.* at 33. The Court in *Berman* stated that Congress had within its police power the ability to clean up slum neighborhoods to protect the general public from disease, crime, and immorality but also to prevent the suffocating of a neighborhood's spirit especially when substandard housing robs a neighborhood of its charm and "makes it a place from which men turn." *Id.*

There is a basic difference between *Berman* and the city of Detroit zoning ordinances. The Washington, D. C., slum clearance upheld in *Berman* was not achieved through the use of zoning. The Congress used the power of eminent domain. However, one commentator described the difference as "immaterial." B. SCHWARTZ, *CONSTITUTIONAL LAW* 188 (1972).

interests of the general public, would have within its police power the ability to zone the location of businesses specializing in adult entertainment to preserve its urban residential neighborhoods.

In the exercise of the police power, state regulations may create a classification.³⁰ The entire concept of zoning is based on the necessary classification of land according to its use.³¹ The regulation of adult book stores and adult motion picture theaters, based on the content of the entertainment featured, involves a two-step equal protection analysis. First, is the content of expression a valid basis for creating a classification that will restrict the location where the expression may be presented?³² Second, how closely should the courts scrutinize regulations which treat adult motion picture theaters and adult book stores differently from all other motion picture theaters and book stores?³³

A. Content as a Basis of Classification

The 1972 Detroit zoning amendments regulate adult book stores, adult motion picture theaters, and adult mini motion picture theaters "distinguished or characterized by their emphasis on matter depicting, describing, or relating to 'Specific Sexual Activities' or 'Specified Anatomical Areas'."³⁴ The ordinance is not limited to establishments dealing in entertainment: books, magazines, periodicals or motion pictures judicially determined to be obscene. Thus the entertainment and other materials are presumptively within the protection of the first amendment.

Freedom of expression is guaranteed by the first amendment, "Congress shall make no law . . . abridging the freedom of Speech."³⁵ Freedom of expression, however, is not an absolute right since expression may be restricted or prohibited.³⁶ Not all expression is guar-

30. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

31. 1 J. METZENBAUM, *THE LAW OF ZONING*, 128 (1930). Such classifications, although necessary, may create an inequality under the law by reason of the classification process. It follows that the argument most often used to challenge zoning is the denial of equal protection under the fourteenth amendment. *Id.*

32. *Young v. American Mini Theatres, Inc.*, 96 S. Ct. 2440, 2449-52 (1976).

33. *Id.* at 2452-53.

34. See note 12 *supra*.

35. U.S. CONST. amend. 1.

36. *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953); *Breard v. Alexandria*, 341 U.S.

anteed protection from regulation³⁷ nor is all protected speech guaranteed complete unrestricted freedom.³⁸ Expression protected by the first amendment may be regulated as to its time, place and circumstances; but the regulation must be completely neutral and nondiscriminatory manifesting neither sympathy nor hostility to the point of view expressed.³⁹

In *Nortown Theatre, Inc. v. Gribbs*,⁴⁰ two adult motion picture theaters⁴¹ located within 1,000 feet of two other regulated uses were in violation of the 1972 Detroit zoning ordinance regulating adult motion picture theaters, adult mini motion picture theaters, and adult book stores.⁴² The theater operators sought injunctions declaring the ordinance unconstitutional and prohibiting its enforcement for denying the unrestricted expression guaranteed by the first amendment and equal protection of the laws guaranteed by the fourteenth amendment.⁴³

The district court held that Detroit's desire to maintain and preserve the residential quality of its neighborhoods was a sufficiently compelling state interest to permit the classification on the basis of content, an incidental infringement of the first amendment.⁴⁴

Nortown was reversed by the Sixth Circuit in *American Mini Theatres, Inc. v. Gribbs (American Mini Theatres I)*.⁴⁵ Using a strict scrutiny equal protection test, the court of appeals held the

622, 642 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

37. *Miller v. California*, 413 U.S. 15, 23 (1973) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (defamation); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (speech as a criminal instrumentality); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words).

38. *Adderly v. Florida*, 385 U.S. 39, 48 (1966); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Kovacs v. Cooper*, 336 U.S. 77, 85-87 (1949); *Near v. Minnesota*, 283 U.S. 697, 718 (1931).

39. *Adderly v. Florida*, 385 U.S. 39, 46-48 (1966); *Cox v. Louisiana*, 379 U.S. 536, 554-55, 558 (1965); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941).

40. 373 F. Supp. 363, 365 (E.D. Mich. 1974), *rev'd sub nom.* *American Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975), *rev'd sub nom.* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

41. 427 U.S. at 55. Of the two theaters, the *Nortown* was an established theater that began to feature adult films on a regular basis, while the other, the *Pussy Cat*, a mini theater converted from a corner gas station, planned to feature adult films. *Id.*

42. *Id.*

43. *Id.*

44. 373 F. Supp. at 371.

45. 518 F.2d 1014, 1021 (6th Cir. 1975).

ordinance unconstitutional.⁴⁶ The classification created by the ordinance regulating places of adult entertainment restricted a fundamental first amendment right, free exercise of expression; and provided unequal protection of the laws in violation of the fourteenth amendment.⁴⁷ The Sixth Circuit found a compelling state interest, but ruled that Detroit failed to prove "that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental."⁴⁸

In *Young v. American Mini Theatres, Inc. (American Mini Theatres II)*,⁴⁹ the Supreme Court reversed the Sixth Circuit and upheld the district court's decision. The Court held that the zoning regulations were not prior restraints on protected first amendment rights⁵⁰ and that the content of expression may be regulated as to time, place, and manner in a nondiscriminatory fashion.⁵¹ The Court concluded that the classification did not violate the equal protection clause since it furthered the city's interest in preserving the character of residential neighborhoods.⁵²

The Supreme Court held that the determination of whether speech is protected by the first amendment and whether protected speech may be restricted or prohibited is based on its content.⁵³ It concluded that using content as the basis of regulating protected speech is valid, provided the regulation is completely neutral with respect to the point of view expressed.⁵⁴

The zoning amendments create a classification determined by the content of the entertainment featured at adult motion picture thea-

46. *Id.* at 1020. The court of appeals seemed to use a much stricter strict scrutiny test than the district court in *Nortown*. The district court required only that the ordinance be "necessary to further a compelling State interest." 373 F. Supp. at 369. The Sixth Circuit required a showing that the means used to implement the compelling state interest be the least objectionable means. 518 F.2d at 1020.

47. *Id.* at 1020-21.

48. *Id.* at 1020.

49. 427 U.S. 50 (1976).

50. *Id.* at 70-73. The Court held that, because neither the distributors nor the exhibitors are denied access to the viewing public nor is the viewing public denied access to the book stores or motion picture theaters, the market for adult entertainment is unrestrained. *Id.* at 62.

51. *Id.* at 63-70.

52. *Id.* at 62.

53. *Id.* at 63-70.

54. *Id.* at 69-70.

ters, adult mini motion picture theaters, adult book stores, and group "D" cabarets. In *American Mini Theatre II*, the Court implied that the locational restriction differentiating between bookstores and motion picture theaters on the basis of the content of the entertainment featured was completely neutral. The Court distinguished *Erznoznik v. City of Jacksonville*,⁵⁵ where the city of Jacksonville made it a public nuisance to exhibit motion pictures at drive-in theaters that featured nudity which was visible from a public street or a public place.⁵⁶ The purpose of the Jacksonville regulation was to protect its citizens from unnecessarily being subjected to offensive expression.⁵⁷ The Supreme Court held that the broad effect of the ordinance prevented the exhibition of any motion picture featuring scenes with nudity at drive-ins. The Court concluded that this censorship of films based on their content alone could not be justified by "the limited privacy interest of persons on the public streets,"⁵⁸ or protection against children viewing the film,⁵⁹ or as a traffic regulation.⁶⁰

The dissent in *American Mini Theatres II* cited *Erznoznik* as "almost on 'all fours'" with *American Mini Theatres II*.⁶¹ Although both ordinances regulate the location of businesses featuring nudity, the Detroit regulations can be distinguished. The Detroit regulations restrict the exhibition of sexually explicit entertainment, whereas the Jacksonville ordinance broadly restricted nudity per se at drive-ins when visible from a public street or public place.⁶² The Jacksonville ordinance was not aimed at sexually explicit nudity, resulting in the prohibition of nudity on the drive-in screen even when innocent and educational.⁶³ While there are myriad locations in Detroit which are 1,000 feet away from two other regulated uses,⁶⁴

55. 422 U.S. 205 (1975); see 427 U.S. at 71 n.35.

56. 422 U.S. at 206-07.

57. *Id.* at 208. It was also argued that the ordinance was justified as "a reasonable means of protecting minors from this type of visual influence." *Id.* at 212, and as a traffic regulation since nudity on the screen distracted passing motorists. *Id.* at 214.

58. *Id.* at 212.

59. The Court found the ordinance to be overbroad in this respect. *Id.* at 213-14.

60. The Court found the ordinance to be underinclusive in this respect. *Id.* at 214-15.

61. 427 U.S. at 88 (Stewart, J., dissenting).

62. *Id.* at 71 n.35.

63. *Id.* See 422 U.S. at 211, 213.

64. 373 F. Supp. at 371.

there are few drive-in locations where the screen is not visible from a public street or a public place. The Jacksonville ordinance effectively prevented the showing of any nudity on drive-in screens.⁶⁵

Unlike the Jacksonville ordinance, the Detroit regulations did not attempt to regulate the location of expression which, while not obscene, was felt to be offensive. In *American Mini Theatres II*, the Court held that the Detroit zoning amendments were evidenced by neither sympathy nor hostility towards the content of the entertainment featured at adult entertainment businesses.⁶⁶ The 1972 Detroit regulations made no judgment as to whether the content of adult entertainment was offensive. The regulations were necessitated by the effects of the location of the entertainment, *i.e.*, the deterioration of residential neighborhoods resulting from the concentration of businesses specializing in adult entertainment.⁶⁷

B. Selection of a Test

The 1972 Detroit zoning ordinances present the problem of how carefully the courts should scrutinize the regulations. The degree of scrutiny a court employs turns on the type of legislation. When considering zoning regulations, a court normally utilizes a minimal scrutiny test.⁶⁸ However, zoning adult book stores, motion picture

65. 422 U.S. at 211.

66. 427 U.S. at 71 n.34. In *Police Dep't v. Mosley*, 408 U.S. 92 (1972), the Supreme Court unanimously struck down a Chicago ordinance prohibiting all but peaceful labor picketing within 150 feet of a school while the school was in session as a violation of the equal protection clause. The Chicago ordinance can be distinguished from the Detroit regulation. The Chicago ordinance failed to retain the neutrality of time, place, and manner with respect to the content of picketing prohibited. The regulation favored peaceful labor picketing over other peaceful picketing without providing a sufficient justification for the unequal treatment. *Id.*

67. 427 U.S. at 71 n.34.

68. The Court presumes the validity of legislation enacted within the scope of the state police power. See *Lindsley v. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). The Court uses a minimal scrutiny test when considering the constitutional validity of social and economic legislation. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Dandridge v. Williams*, 397 U.S. 471, 484-86 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-27 (1961); *Morey v. Doud*, 354 U.S. 457, 465 (1957); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Court will uphold a classification provided it has a reasonable basis in fact and it is rationally related to the stated purpose of the legislation. See *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *McDonald v. Board of Election*, 394 U.S. 802, 808-09 (1969); *Morey v. Doud*, 354 U.S. 457, 465 (1957); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Traditionally the Court has used a minimal scrutiny test when zoning classifications have been challenged as a violation of the fourteenth amendment equal protection

theaters, and cabarets creates a classification among those establishments based on the content of entertainment presented to the public.⁶⁹ The ordinance regulates the free exercise of expression, a fundamental right guaranteed by the first amendment.⁷⁰ When a fundamental right is restricted, a court is required to scrutinize the regulating classification much more strictly.⁷¹

In *Nortown Theatre, Inc. v. Gribbs*,⁷² the district court used the strict scrutiny test since the regulation restricted a fundamental right protected by the first amendment.⁷³ The court held that the ordinance prohibiting more than two regulated businesses within 1,000 feet of each other was necessary to further a compelling state interest, the preservation of urban residential neighborhoods.⁷⁴ In

clause. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Washington ex rel. Seattle Title Trust Co., v. Roberge*, 278 U.S. 116, 120-21 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

69. 427 U.S. at 58, 65.

70. See notes 34-38 *supra* and accompanying text.

71. When the created classification is a suspect classification (see, e.g., *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)) or infringes on an individual's fundamental rights (see *Graham v. Richardson*, 403 U.S. 365, 375 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)), not only must the classification be reasonable but it must be necessary to further a compelling state interest. See *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Sherbert v. Verner*, 374 U.S. 398, 407 (1962).

72. 373 F. Supp. 363 (E.D. Mich. 1974). See 52 J. URB. L. 388 (1974).

73. 373 F. Supp. at 369.

74. The *Nortown* court, however, did not find that prohibition of a regulated use "within 500 feet of any building containing a residential dwelling or rooming unit," DETROIT, MICH., OFFICIAL ZONING ORDINANCE 742-G § 66.0103, 1972, was necessary to further a compelling state interest, the preservation of urban residential neighborhoods. "In prohibiting regulated uses within 500 feet of a single dwelling or living unit, the Ordinance imposes a greater incidental restriction on First Amendment freedoms than is essential to preserve and stabilize residential neighborhoods." *Nortown Theatre, Inc. v. Gribbs*, 373 F. Supp. 363, 371 (E.D. Mich. 1974).

DETROIT, MICH., OFFICIAL ZONING ORDINANCE 891-G § 66.0103, 1974 has amended the constitutionally invalid 1972 section by prohibiting the establishment of a regulated use within 500 feet of a residentially zoned district. *Id.*

New York's proposed legislation has also included the amended change. It provides for a required distance of 500 feet from a residential district, rather than just a single residential dwelling or rooming unit and "[t]he distance shall be determined by measuring from the edge of the nearest residential district boundary to the closest lot line of the zoning lot containing an adult use." N.Y.C. PROPOSED AMENDMENTS art. III, ch. 2, § 32-461.

American Mini Theatres II, the Supreme Court summarily upheld the district court's use of the strict scrutiny test and its finding that the ordinance did not violate the equal protection clause of the fourteenth amendment.⁷⁵ The Court impliedly rejected the Sixth Circuit's holding in *American Mini Theatres I*⁷⁶ that there was no showing that such an ordinance was necessary or proof that the means chosen were the least objectionable.⁷⁷ The Supreme Court held that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."⁷⁸

III. The Twenty-First Amendment—The Influences of Alcohol

Under the twenty-first amendment, a state may regulate the time, place, and circumstances of intoxicating beverage sales within its borders.⁷⁹ Because the twenty-first amendment traditionally has not been confined by commerce clause restrictions,⁸⁰ the amendment has been given an expansive interpretation. The power granted to the states by the twenty-first amendment seems to go beyond the traditional scope of the state's police power. "[T]he

75. 427 U.S. at 71-73.

76. 518 F.2d 1014 (6th Cir. 1975). See generally 44 FORDHAM L. REV. 657 (1975); 10 GA. L. REV. 275 (1975); 54 TEX. L. REV. 422 (1976).

77. 427 U.S. at 71-73.

78. *Id.* at 71.

79. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board v. Young's Market Co.*, 299 U.S. 59 (1936).

80. *Craig v. Boren*, 97 S. Ct. 451, 460-63 (1976); *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 41 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 137-38 (1939). Article I, section 8, clause 3 of the United States Constitution prohibits state regulation of the free flow of commerce "among the several states." State prohibition of intoxicating liquors in interstate commerce ordinarily would be a violation of the commerce clause, but section 2 of the twenty-first amendment was enacted to insure that states could regulate the transportation, importation, or possession of intoxicating liquors for delivery or use within their boundaries and thereby remain dry without fear of violating the commerce clause. See *id.*

Consequently, section 2 of the twenty-first amendment has been the source of much controversy. Litigation has questioned the limit of the state's power to regulate intoxicating liquors within its borders in seeming contradiction to the free flow of commerce, as well as the authority of the federal government, to regulate intoxicating liquors. See Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578 (1975).

broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."⁸¹ Although this particular power may be extraordinary, it does not give the states the power to dispense⁸² with constitutional rights in the area of intoxicating beverages control.⁸³

A. *California v. LaRue*

The Supreme Court further expanded the state's twenty-first amendment police power to regulate the sale of intoxicating beverages in *California v. LaRue*.⁸⁴ The Court held that a narrowly drawn regulation,⁸⁵ using the state's twenty-first amendment authority, could prohibit sexually explicit entertainment that "partake[s] more of gross sexuality than of communication"⁸⁶ in an establish-

81. *California v. LaRue*, 409 U.S. 109, 114 (1972). See also *Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 409 F. Supp. 497, 506 (E.D. Va. 1976).

82. *Department of Revenue v. James Beam Co.*, 377 U.S. 341, 344-45 (1964); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329-34 (1964); *Walker v. Hall*, 399 F. Supp. 1304, 1307-08 (W.D. Okla. 1975); *Manos v. City of Green Bay*, 372 F. Supp. 40, 46-48 (E.D. Wis. 1974); *Escheat, Inc. v. Pierstorff*, 354 F. Supp. 1120, 1125 (W.D. Wis. 1973).

83. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), Hartford, Wisconsin prevented "the sale or gift of intoxicating liquors to one who by 'excessive drinking' produces described conditions or exhibits specified traits, such as exposing himself or family 'to want' or becoming 'dangerous to the peace' of the community." *Id.* at 434. To accomplish this task notices were posted in the retail liquor outlets in Hartford forbidding the sale or gift of intoxicating beverages to certain listed persons. *Id.* at 435. The Supreme Court recognized the state's twenty-first amendment power to regulate such sale or gift, but held that posting such a quasi-judicial characterization without a notice to the person listed or an opportunity to be heard denied that person his procedural due process rights guaranteed by the due process clause of the fourteenth amendment. *Id.* at 436-37.

In a recent decision, *Craig v. Boren*, 97 S. Ct. 451 (1976), the Supreme Court held that an Oklahoma statute prohibiting the sale of 3.2 percent beer to males under the age of twenty-one and females under the age of eighteen was an invidious gender based discrimination. The Court stated that it has "never recognized sufficient 'strength' in the [twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause." *Id.* at 462. See also *White v. Fleming*, 522 F.2d 730, 733 (7th Cir. 1975); *Women's Liberation Union v. Israel*, 512 F.2d 106, 108 (1st Cir. 1975); *Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc.* 409 F. Supp. 497 (E.D. Va. 1976).

84. 409 U.S. 109 (1972). See generally Kamenshine, *California v. LaRue: The Twenty-First Amendment as a Preferred Power*, 26 VAND. L. REV. 1035 (1973); 12 DUQ. L. REV. 1008 (1974); 61 GEO. L. REV. 1577 (1973); 7 URB. L. ANN. 421 (1974); 1973 UTAH L. REV. 320; 19 VILL. L. REV. 177 (1973). See also *Craig v. Boren*, 97 S. Ct. 451 (1976). This recent Supreme Court decision would seem to limit severely the twenty-first amendment's grant of regulatory powers beyond the purely economic traditional commerce clause considerations. *Id.* at 462.

85. See *LaRue v. California*, 326 F. Supp. 348, 358-60 (C.D. Cal. 1971).

86. 409 U.S. at 118.

ment licensed to serve alcoholic beverages when the mix of alcohol and adult entertainment fosters documented anti-social behavior.⁸⁷ The regulation may prohibit such entertainment, even though it would not be classified as obscene under the *Roth v. United States*⁸⁸ "community standards" test and as such it would warrant first amendment freedom of expression protection.⁸⁹ The regulation may prohibit performances classified by their content without violating the equal protection clause of the fourteenth amendment.⁹⁰ The Court's authority for permitting this infringement of first amendment rights without any prior judicial determination of whether such conduct is obscene is "the added presumption in favor of the validity of the state regulation in this area [of liquor control] that the Twenty-first Amendment requires."

LaRue does not categorically authorize the prohibition of nude dancing or nudity per se where alcohol is sold.⁹² Lower courts have broadly misinterpreted *LaRue* to authorize the prohibition of all nudity in establishments licensed to dispense alcoholic beverages, without requiring that nudity or sexually oriented performances partake more of gross sexuality than of communication and without requiring a showing that the combination of such entertainment and alcohol produces certain anti-social behavior.⁹³

In *Paladino v. City of Omaha*,⁹⁴ a tavern owner lost his liquor license after he featured topless entertainment in violation of a municipal ordinance prohibiting nudity on premises licensed to sell intoxicating beverages.⁹⁵ The Eighth Circuit upheld the ordinance which was admittedly more restrictive than the regulation upheld

87. *Id.* at 111. At a public hearing prior to issuing the regulation, there was testimony of oral copulation between customers and female entertainers as well as public masturbation by customers within the licensed premises; outside the premises, there was prostitution involving the entertainers, indecent exposure, rape, attempted rape and assaults on police officers. *Id.*

88. 354 U.S. 476, 489 (1957). Since *LaRue*, the *Roth* test has been replaced by an obscenity test outlined in *Miller v. California*, 413 U.S. 15, 24-25 (1973).

89. 409 U.S. at 114, 116.

90. See section II(A) *supra*.

91. 409 U.S. at 118-19.

92. *Id.* See *Clark v. City of Fremont*, 377 F. Supp. 327, 342 (D. Neb. 1974).

93. *Paladino v. City of Omaha*, 471 F.2d 812 (8th Cir. 1972); *McCue v. City of Racine*, 351 F. Supp. 811 (E.D. Wis. 1972).

94. 471 F.2d 812 (8th Cir. 1972).

95. *Id.* at 813.

in *LaRue*⁹⁶ in that it prohibited topless dancing per se.⁹⁷ The court liberally interpreted *LaRue* to hold that sexually oriented performances, whether or not obscene, could be prohibited under the twenty-first amendment in establishments licensed to sell intoxicating beverages by the drink.⁹⁸ It upheld the prohibition of nudity, without requiring that the performance partake more of gross sexuality than a dramatic performance and without a showing that such adult entertainment combined with alcoholic beverages produced any kind of anti-social behavior. The court only required that the determination of which sexually oriented performance was to be barred not be irrational.⁹⁹

In *McCue v. City of Racine*,¹⁰⁰ the United States District Court for the Eastern District of Wisconsin upheld the constitutionality of a municipal ordinance prohibiting nude entertainment in taverns licensed to sell alcoholic beverages by the drink.¹⁰¹ As the court interpreted *LaRue*, nudity per se could be regulated without any requirement that the performance partake more of gross sexuality than of communication. "The very language of the California regulation upheld by the Supreme Court in *LaRue* refutes plaintiff's contention that the decision only applies to acts of gross sexuality and not to nudity or nude dancing per se."¹⁰²

The courts have expressed their frustration with interpreting *California v. LaRue*.¹⁰³

Apparently then the line between the protected dance and the unprotected can be drawn at a different point when the establishment in question sells liquor by the drink. A tavern owner seeking guidance from the court's opinion in *LaRue* learns only that a performance by a "scantly clad ballet troupe" is still protected, but "bacchanalian revelries" are not.

The better reasoned cases note the qualifying limitations in *LaRue*. *Peto v. Cook*¹⁰⁴ turned on the illegal seizure of allegedly

96. *Id.* at 814.

97. The City of Omaha regulation prohibited nude entertainers, waitresses, hostesses, managers and owners. *Id.* at 813.

98. *Id.* at 814.

99. *Id.*

100. 351 F. Supp. 811 (E.D. Wis. 1972).

101. *Id.* at 813.

102. *Id.* at 812.

103. *Manos v. City of Green Bay*, 372 F. Supp. 40, 46-47 (E.D. Wis. 1974).

104. 364 F. Supp. 1 (S.D. Ohio 1973).

obscene printed material.¹⁰⁵ The case involved an ordinance prohibiting live sex entertainment in establishments licensed to sell alcoholic beverages by the drink as well as to take out.¹⁰⁶ The court held that the Department of Liquor Control has a valid function regulating obscenity within the limits defined by *California v. LaRue*.¹⁰⁷ It clearly defined the types of sexual entertainment that may be regulated as those that partake more of gross sexuality than of communication,¹⁰⁸ and noted the absence of previous legislative hearings to determine whether the combination of adult entertainment and alcohol produced the anti-social behavior described in *LaRue*.¹⁰⁹

Following *Peto v. Cook*, the United States District Court of Nebraska in *Clark v. City of Fremont*¹¹⁰ stressed that *LaRue* "must be limited to the facts out of which the case arose."¹¹¹ Unless the prohibited performance partakes more of gross sexuality than of communicative expression, it can not be regulated.¹¹² The court concluded that topless dancing or nudity per se is not gross sexuality but is a protected form of expression.¹¹³ These performances can not be regulated without prior judicial determination of whether they are obscene.¹¹⁴

B. *Felix v. Young*

In *Felix v. Young*,¹¹⁵ plaintiff operated a cabaret that featured topless dancing without a group "D" cabaret license. The cabaret, located within 1,000 feet of three other regulated uses, was in violation of the 1972 Detroit municipal zoning ordinance. Plaintiff sought to enjoin the enforcement of the ordinance. He claimed the zoning ordinance, as applied to businesses specializing in adult entertainment, violated the equal protection clause of the fourteenth amendment by creating a classification based on the content of expression

105. *Id.* at 4.

106. *Id.* at 3 n.5.

107. *Id.* at 5.

108. *Id.* at 3.

109. *Id.*

110. 377 F. Supp. 327 (D. Neb. 1974).

111. *Id.* at 339.

112. *Id.* at 341-42.

113. *Id.* at 342. See *Attwood v. Purcell*, 402 F. Supp. 231, 234 (D. Ariz. 1975).

114. 377 F. Supp. at 342.

115. 536 F.2d 1126 (6th Cir. 1976).

offered. As such, this classification was an unlawful infringement upon his right to unrestricted expression guaranteed by the first amendment.¹¹⁶

The district court held that the Detroit ordinance zoning group "D" cabarets was constitutional on its face.¹¹⁷ The court based its decision on *Nortown Theatre, Inc. v. Gribbs*,¹¹⁸ an earlier Eastern District of Michigan case which had upheld the zoning regulations as applied to adult motion picture theatres, adult mini motion picture theatres, and adult book stores. The Sixth Circuit affirmed *Felix*,¹¹⁹ but on other grounds.¹²⁰

The court of appeals noted a critical distinction between group "D" cabarets and adult motion picture theaters and adult book stores. Cabarets unlike adult motion picture theaters are licensed to sell alcoholic beverages.¹²¹ Based on the Supreme Court's decision in *California v. LaRue*,¹²² the Sixth Circuit upheld the validity of zoning cabarets featuring topless dancers, go-go dancers, exotic dancers, strippers and male or female impersonators as a regulatory power under the twenty-first amendment. The court reasoned that the presence of intoxicating beverages warranted the relaxation of traditional first amendment standards because of the presumption of validity provided by the twenty-first amendment to regulations over the sale of intoxicating liquors.¹²³ Although *LaRue*, authorized the relaxation of traditional first amendment guarantees, it did so with the specific limitations, which are not present in *Felix v. Young*.

Although the Detroit regulation is less restrictive than the California ordinance in that it does not prohibit regulated entertainment but only restricts the location where it might be featured, it is much more restrictive than the California ordinance because it regulates more than explicit gross sexuality. The Detroit regulation broadly restricts entertainment which does not partake more of gross sexual-

116. *Id.* at 1129.

117. *Id.* at 1133.

118. 373 F. Supp. 363 (E.D. Mich. 1974). For a discussion of *Nortown*, see notes 38-42 *supra* and accompanying text.

119. 536 F.2d 1126 (6th Cir. 1976).

120. *Id.* at 1136.

121. *Id.* at 1131.

122. 409 U.S. 109 (1972).

123. 536 F.2d at 1131-32.

ity than of communicative expression and which does not have to be topless or even adult.¹²⁴ The twenty-first amendment presumption of validity would probably not permit this increased infringement of protected first amendment expression even if the courts found that the prevention of urban decay resulting from the mushrooming concentrations of group "D" cabarets was a compelling state interest.

IV. Conclusion

Restricting the location of adult entertainment requires a delicate balance between preventing residential urban decay prompted by the concentration of businesses specializing in adult entertainment, and protecting the first amendment freedom of non-obscene adult expression. Detroit has successfully achieved this delicate balance through a valid exercise of its zoning power.¹²⁵

The Supreme Court has held that Detroit's regulation of the location of entertainment on the basis of its adult content is constitutionally valid. The regulation is completely neutral swayed neither by hostility nor sympathy towards the content of the entertainment.¹²⁶ The regulation aims only at preventing proven residential urban decay, a sufficiently compelling state interest to warrant locational infringements on protected first amendment expression.¹²⁷

The proposed New York zoning amendments are modelled almost identically on Detroit's regulations except that New York adds a "plan of amortization" which requires that any preexisting adult establishment that would violate the proposed amendments be terminated within one year of the effective date of the amendments.¹²⁸ New York is as interested in cleaning up areas infested with businesses specializing in adult entertainment as it is in preventing the future concentrations of these businesses.¹²⁹

The courts must consider two aspects of the proposed New York amendments; the 500 foot restriction of adult entertainment businesses from residential districts¹³⁰ and the "plan for amortiza-

124. See note 13 *supra*.

125. See notes 20-29 *supra* and accompanying text.

126. See notes 34-67 *supra* and accompanying text.

127. See notes 67-78 *supra* and accompanying text.

128. See note 8 *supra*.

129. N.Y. Times, Nov. 12, 1976 at A1, col. 4; *id.*, Nov. 16, 1976 at 43, col. 1.

130. See note 7 *supra*.

tion.”¹³¹ The 500 foot restriction should be upheld based on the holding of *American Mini Theatres II*. The Supreme Court stated that a municipality may control the location of theaters to satisfy certain locational as well as other requirements, “either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city.”¹³² The New York regulation is not as restrictive as the original Detroit ordinance prohibiting the location of any adult use within 500 feet of a single dwelling or living unit. That regulation had seriously curtailed the possible sites for businesses specializing in adult entertainment.¹³³

The plan for amortization poses a more difficult problem. In *American Mini Theatres II*, the Court stated, “[t]he situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech. Here, however, the District Court specifically found that ‘[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones.’”¹³⁴ This would seem to imply that regulation of preexisting adult entertainment businesses, *i.e.*, the closing down of those establishments that do not conform to the zoning regulations, would impose too great a restriction on the access to first amendment protected expression.

The New York “plan for amortization” does not seem any more restrictive than the constitutionally valid regulation of proposed adult entertainment businesses. The plan is basically no more than a limitation on the place where adult films might be exhibited. Although it might inconvenience some of the patrons presently frequenting these establishments, the demand will create new establishments that will be more convenient for other patrons.¹³⁵ And while businesses would be required to close down, they would be “affected no differently than any other commercial enterprise that suffers economic detriment as a result of land-use regulation.”¹³⁶ Thus, the “plan for amortization” is a further extension of the limi-

131. See note 8 *supra*.

132. 427 U.S. at 62.

133. 373 F. Supp. at 371. See note 74 *supra*.

134. 427 U.S. at 71 n.35, quoting *Nortown Theatre, Inc. v. Gribbs*, 373 F. Supp. 363, 371 (E.D. Mich. 1974).

135. 427 U.S. at 81 n.4 (Powell, J., concurring).

136. *Id.* at 78.

tation on the location where adult entertainment may be featured, but it does not restrict or prohibit the content availability of adult entertainment.

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